



THE VICE PRESIDENT
WASHINGTON

TO THE HOUSE OF REPRESENTATIVES:

I am writing to inform you of certain actions undertaken by an agent of the Congress, Comptroller General David M. Walker, which exceed his lawful authority and which, if given effect, would unconstitutionally interfere with the functioning of the Executive Branch.

By memorandum of January 29, 2001, the President established the National Energy Policy Development Group ("Group"). The Group consists of six executive department heads (Treasury, Interior, Agriculture, Commerce, Transportation and Energy), two agency heads (Federal Emergency Management Agency and Environmental Protection Agency), three officers of the White House staff (Policy, Economic Policy, Intergovernmental), and the Vice President. The memorandum specified that the Group's "functions shall be to gather information, deliberate, and as specified in this memorandum, make recommendations to the President." It called for the Group to submit to the President a near-term assessment and then a report setting forth "a recommended national energy policy to help the private sector, and as necessary and appropriate State and local governments, promote dependable, affordable, and environmentally sound production and distribution of energy for the future." The Group issued its report on May 16, 2001. The President approved the report's recommendations, now commonly called the National Energy Policy.

The Comptroller General proposed to investigate the workings of the Group and sought certain information from the Vice President's staff. The first appendix to this Message is a chronology of the interaction between the Comptroller General and my staff on this matter. As a matter of comity, my staff furnished substantial information regarding the Group, providing written answers dated May 4, 2001 to questions concerning the Group, a copy of the Presidential Memorandum establishing the Group, and documents responsive to the Comptroller General's inquiry concerning costs associated with the Group's work. In response to separate requests from the General Accounting Office, executive agencies also have provided substantial responses concerning the roles of their agency heads on the Group.

On July 18, 2001, the Comptroller General sent to me a letter which stated that he was reviewing "the process by which the National Energy Policy was developed" and that the purpose of the letter was to "demand" certain documents. With regard to documents not already provided that the Comptroller General has demanded, statutory and constitutional reasons for not providing them are set forth in the second appendix to this Message. I am furnishing a copy of this Message, including its appendices, to the Comptroller General so that the copy will serve as the response to his letter of July 18, 2001 that he would receive under Section 716(b)(1) of Title 31 of the U.S. Code if that provision were applicable in this matter.

Richard B. Cheney

Aug. 2, 2001
Date



THE VICE PRESIDENT
WASHINGTON

TO THE SENATE:

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Richard B. Cheney

Aug. 2, 2001
Date

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APPENDIX 1: CHRONOLOGY OF INTERACTION OF THE VICE PRESIDENT'S STAFF WITH THE GENERAL ACCOUNTING OFFICE

On April 19, 2001, Representatives John Dingell (D-MI) and Henry Waxman (D-CA) sent a letter to the Executive Director of the National Energy Policy Development Group ("Group"), asking a lengthy series of questions and asking for all records of the Group relating to its meetings. That same day, they asked the General Accounting Office (GAO) to initiate an investigation.

On May 4, 2001, the Vice President's counsel forwarded to Messrs. Dingell and Waxman answers from the Executive Director of the Group to their questions.

On May 8, 2001, a GAO Assistant Director faxed to the Office of the Vice President a request to interview Group officials and staff and for production of records and information.

On May 15, 2001, Representatives Dingell and Waxman sent another letter to the Executive Director of the Group, expressing dissatisfaction with the answers to their questions previously received and requesting more information and records, including all of the following relating to the Group:

... correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, invoices, confirmations, telegraphs, telexes, agendas, books, notes, pamphlets, periodicals, reports, studies, evaluations, opinions, logs, diaries, desk calendars, appointment books, tape recordings, video recordings, e-mails, voice mails, computer tapes, or other computer stored matter, magnetic tapes, microfilm, microfiche, punch cards, all other records kept by electronic, photographic, or mechanical means, charts, photographs, notebooks, drawings, plans, inter-office communications, intra-office and intra-departmental communications, transcripts, checks and canceled checks, bank statements, ledgers, books, records of statements of accounts, and papers and things similar to any of the foregoing, however denominated.

On May 16, 2001, the Vice President's counsel wrote to the GAO General Counsel, asking the Comptroller General to determine whether the proposed GAO inquiry was appropriate, in compliance with the law, and, especially in light of information already provided, a productive use of resources, and asking the GAO General Counsel for a statement of GAO's legal authority to conduct its proposed inquiry.

On May 22, 2001, Representatives Dingell and Waxman wrote to the Vice President's counsel stating that they were "astounded" that the GAO's authority had been questioned.

On May 25, 2001, the Vice President's counsel wrote to counsel for Messrs. Dingell and Waxman, reporting on the status of correspondence with GAO in the matter.

On June 1, 2001, the GAO General Counsel wrote to the Vice President's counsel, advising that the Comptroller General wished to go forward with the inquiry and citing as

authority for the inquiry Sections 712, 716, and 717 of Title 31 of the U.S. Code. The letter said that GAO would "initially" like to focus on:

1. Previously, you identified 9 meetings conducted by the NEPDG and indicated that each meeting was held in the White House Complex. For each meeting, we want to learn the name of each attendee, title, and office represented, as well as the duration of the meeting.
2. Previously, you stated that 6 professional staff, referred to as the Group support staff, were assigned to the Office of the Vice President for the purpose of supporting the NEPDG. We want to learn their name, title, office or employer represented; the date on which that person began working for that office; and their responsibilities.
3. Previously, you indicated that various members of the Group support staff met with many individuals to gather information relevant to the NEPDG work. For each interview or meeting, we want to establish (a) its date and location, (b) the persons met with, including their name, title, and office or clients represented, (c) its purpose and agenda, (d) the information presented, (e) whether minutes or notes were kept, and (f) how members of the NEPDG or Group support staff determined who would be invited to the interviews or meetings.
4. We are interested in learning whether the Vice President met with individuals to gather information relevant to the NEPDG and, if so, we want to obtain the same information listed in question 3 above.
5. We are interested in obtaining the direct and indirect costs incurred by both the Vice President and the Group support staff.

After discussing these questions with you, we would also like to arrange meetings with members of the Group support staff to discuss meetings they conducted and the process they used to develop information in support of the task force.

On June 7, 2001, the Vice President's counsel wrote to the GAO General Counsel, advising that Sections 717 (which allows GAO to investigate agency implementation of statutes, but not performance of constitutional duties) and 716 of Title 31 of the U.S. Code (which provides information collection procedures for otherwise-authorized investigations) provide no basis for the GAO inquiry, and that the limited authority of Section 712 (authorizing investigation of use of public money) would provide support for only one of the questions asked, relating to costs. The letter therefore stated that the Office of the Vice President would search for documents responsive to the GAO question regarding the direct and indirect costs of the Group.

On June 21, 2001, the Vice President's counsel sent a letter to GAO forwarding 77 pages of documents responsive to the GAO question regarding the direct and indirect costs of the Group.

On June 22, 2001, GAO sent to the Vice President's counsel a letter claiming to have broad authority to investigate under Sections 712 and 717 of Title 31 and indicating that GAO may issue a "demand letter" under Section 716 of Title 31 that could lead to litigation.

On July 9, 2001, in response to the request of Executive Branch lawyers for an opportunity to meet with the GAO General Counsel to see if a proper accommodation were possible, the meeting occurred, but no proper accommodation was reached.

On July 18, 2001, the Comptroller General issued a letter to the Vice President of the United States demanding documents as follows:

1. Your counsel identified nine meetings conducted by the National Energy Policy Development Group (NEPDG) in his May 4, 2001, letter to the Chairmen and Ranking Minority Members of the House Committee on Energy and Commerce and the House Committee on Government Reform (hereinafter May 4 letter). We request records providing the names of the attendees for each meeting, their titles, and the office represented.
2. In the May 4 letter, your counsel indicated that six professional staff, referred to as the group support staff, were assigned to the Office of the Vice President to provide support to the NEPDG. We request records providing their names, titles, the office each individual represented, the date on which each individual began working for such office, and the responsibilities of the group support staff.
3. In the May 4 letter, your counsel indicated that various members of the group support staff met with many individuals to gather information relevant to the NEPDG work. We request records providing the following information with regard to each of these meetings: (a) the date and location, (b) any person present, including his or her name, title, and office or clients represented, (c) the purpose and agenda, (d) any information presented, (e) minutes or notes, and (f) how members of the NEPDG, group support staff, or others determined who would be invited to the meetings.
4. We request records providing the following information with regard to any meetings the Vice President as chair of the NEPDG had with individuals to gather information relevant to the NEPDG: (a) the date and location, (b) any person present, including his or her name, title, and office or clients represented, (c) the purpose and agenda, (d) any information presented, (e) minutes or notes, and (f) how the Vice President or others determined who would be invited to the meetings.
5. We request any records containing information about the direct and indirect costs incurred in the development of the National Energy Policy. To date, we have been given 77 pages of miscellaneous records purporting to relate to these direct and indirect costs. Because the relevance of many of these records is unclear, we continue to request all records responsive to our request, including any records that clarify the nature and purpose of these costs.

The GAO has also made separate requests for information relating to the Group to various executive departments and agencies and has received responses.

On July 31, 2001, the Comptroller General and the Counsel to the Vice President spoke by telephone regarding the Comptroller General's letter of July 18, 2001 to the Vice President.

On August 1, 2001, the General Counsel of the General Accounting Office and the Counsel to the Vice President spoke by telephone regarding the Comptroller General's letter of July 18, 2001 to the Vice President.

APPENDIX TWO: REASONS

With regard to documents not already provided that the Comptroller General has demanded from the Vice President, the reasons for not providing them are as set forth in this appendix. The statutes under which the Comptroller General purports to act, Sections 717, 712, and 716 of Title 31 of the U.S. Code, do not grant the authority he purports to exercise. Moreover, if his misconstruction of the statutes were to prevail, his conduct would unconstitutionally interfere with the functioning of the Executive Branch of our Government.

Section 717 permits the Comptroller General at the request of a House of Congress, a congressional committee of jurisdiction, or on his own initiative to "evaluate the results of a program or activity the Government carries out under existing law." The Comptroller General lacks authority under Section 717 to investigate the President's exercise of his constitutional powers. The National Energy Policy Development Group and its work constitute such an exercise. The Vice President and the other officers of the United States who serve on the Group act not pursuant to statute but instead only in relation to exercise of the President's constitutional authorities, including his authority to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," to "take Care that the Laws be faithfully executed," and, with respect to Congress, to "recommend to their Consideration such Measures as he shall judge necessary and expedient." Further, the Comptroller General is not evaluating the "results" of the Group's work; he is attempting to inquire into the process by which the results of the Group's work were reached. Finally, the Comptroller General has not claimed that he is conducting the proposed investigation on his own initiative, and has instead stated that he is conducting it at the request of two Congressional committees, yet no Committee (as distinguished from two individual Members of Congress who serve as the ranking minority members of two committees) has made such a request to the Comptroller General.

Section 712, which permits the Comptroller General to investigate matters related to the "receipt, disbursement, and use of public money," applies if at all only to his question concerning the costs of the Group's work. Documents that pertain to the costs of the Group already have been produced to the Comptroller General as a matter of comity. The narrow authority conferred by Section 712 does not provide a basis for his other questions.

Section 716 allows the Comptroller General to seek to compel production of documents only when he has the requisite need for the documents for a lawful inquiry conducted in accordance with Section 712 or 717. Because Sections 712 and 717 do not provide a basis for the Comptroller General's inquiries, and because Section 716 is not an independent source of authority to investigate, Section 716 provides no authority to demand or compel production of the Vice Presidential documents demanded. Moreover, the term "agency" as used in Section 716 does not include the Vice President of the United States, who is a constitutional officer of the Government.

If the Comptroller General's misconstruction of the statutes cited above were to prevail, his conduct would unconstitutionally interfere with the functioning of the Executive Branch. For example, due regard for the constitutional separation of powers requires respecting the independence of the President, the Vice President and the President's other senior advisers as they execute the function of developing recommendations for policy and legislation -- a core constitutional function of the Executive Branch. Also, preservation of the ability of the Executive Branch to function effectively requires respecting the confidentiality of communications among a President, a Vice President, the President's other senior advisers and others. A President and his senior advisers must be able to work in an atmosphere that respects confidentiality of communications if the President is to get the good, candid advice and other information upon which wise decisionmaking depends. Note that while the Vice President is the President of the Senate, he also has executive duties and responsibilities in support of the President, as the Congress has by law recognized.